

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1186

To be argued by
ARMENDE LESSER

B
P/s

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

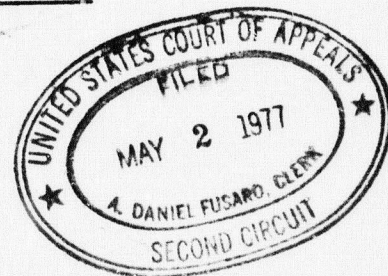
Docket No.
77-1186

ROBERT M. LINDAU,

Defendant-Appellant.

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BRIEF AND APPENDIX FOR DEFENDANT-
APPELLANT ROBERT M. LINDAU



ARMENDE LESSER
Attorney for Defendant-
Appellant Robert M. Lindau
Office and P.O. Address
475 Fifth Avenue
New York, New York 10017
(212) 685-7908

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ROBERT M. LINDAU,

Defendant-Appellant.

-----x

BRIEF AND APPENDIX FOR DEFENDANT-
APPELLANT ROBERT M. LINDAU

Preliminary Statement

Defendant, Robert M. Lindau, appeals from a judgment of conviction rendered after trial before United States District Judge Robert L. Carter and a jury, convicting him of violating Section 1709 of Title 18 of the United States Code, specifically with embezzlement as an employee of the Postal Service, and the sentence of two years of which he is to serve ninety days imprisonment, the remaining time under supervised probation.

Timely notice of appeal was filed, and by directive and pursuant to the rules of this Court, Armende Lesser was directed to prosecute this appeal as counsel for the defendant-appellant. The defendant is presently incarcerated in a Federal facility pending the determination of this appeal.

Indictment

The indictment alleges:

- (a) "On or about the 5th day of May, 1976, in the Southern District of New York, Robert M. Lindau, the defendant, being a Postal Service employee, did unlawfully, wilfully and knowingly embezzle the letters which had come into possession, and were intended to be conveyed by mail, set forth in Counts One through Fourteen."
- (b) Followed by Counts One through Fourteen consisting of a letter setting forth the name and address of the sender and the addressee, in each instance a division of "16 Magazine."

(Title 18, United States Code, Section 1709)

Statement of Facts

Basically, defendant, a Postal Service letter carrier, was charged with embezzlement of fourteen

letters addressed to the Sixteen Magazine, each letter constituting a separate and distinct count in the indictment.

Irene Boris, Chief Mail Clerk of Sixteen Magazine, Inc., testified that her concern had some difficulty with mail addressed to it in that some of the mail contained double postmarks. She specifically indicated a letter from Idaho postmarked California, and that in each instance the check contained an older date. (The address of Sixteen Magazine as set forth in the indictment was 745 Fifth Avenue, New York, New York 10022.) (Tr. 26 and 28)*

Raymond Sahadi, the Delivery Supervisor of the FDR Postal Station at 909 Third Avenue, New York, New York 10022, generally testified as to the routine follow up in the inner post office from the sorting and carrier delivery of the mail. He testified that the mail is sorted in the "Up City" room and placed in bins indicating the route for the individual carriers or, where the addressee receives considerable mail, the name of the organization. The carriers would then go through

*Refers to the trial transcript.

the aisles of this room, remove the mail to be delivered by them, sort them by the delivery address, then place them in their mail sacks, and then proceed to their routes for direct delivery to the addressee. (Tr. 33, 11. 19-25; Tr. 35, 11. 3-6)

Though the Government sought to elicit postal regulations or directives with respect to the "Up City" procedure, the court sustained counsel's objection but did permit the witness to state that they were in writing. (Tr. 41, 1. 19; Tr. 44, 11. 14-15)

On cross-examination, this witness admitted it was defendant's function to collect the mail from the inner post office, place it in his mail sack and make the deliveries accordingly. (Tr. 48, 1. 25 to Tr. 49, 1. 3)

This witness would then place himself at a point where he did observe the bulk of the mail sacks so that he could make a mental note of the time required by the individual carrier to complete his deliveries and then return to the post office for a repeat of the inner office procedure. (Tr. 49)

Frank R. Popoli, a special investigator, testified that on May 4, 1976, while in the FDR Post Office

lookout gallery (an observation enclosure with a one-way mirror), he surveyed the employees, specifically watching the Sixteen Magazine separation. (Tr. 52) That during a coffee break, he observed the defendant removing mail from separations other than Route 13, place on a carrier tray, and then ultimately band them and place them in his mail sack together with mail from his own route. (Tr. 55)

The next day this witness, together with Inspector Macho, stationed himself on the lookout gallery and observed defendant "sweep" mail for Route 13, which he took back to his case for distribution. (Tr. 60, 1. 15 to Tr. 61, 1. 2) That shortly thereafter and during the coffee break, the defendant removed mail from his own route (13) together with mail from other routes, which he made up into bundles, placed them in his delivery sack and then left the building for his route. (Tr. 62) That Inspector Macho together with Inspector Nehil followed the defendant out of the building and subsequently intercepted the defendant while on the street heading toward his route.

On cross-examination the witness conceded that he could not read the addressee on the envelopes

removed from the various sections by the defendant and that after the mail was sorted, they were bundled and placed in a blue regulation postal satchel. (Tr. 66, 11. 16-25) That at no time did the defendant open any mail, secrete it on his person. That all mail remained intact and was placed in the regulation bag supplied by the United States Government. (Tr. 67)

Christine M. Macho, a postal inspector, generally corroborated the testimony of the prior witnesses with respect to their observation through the one-way mirror in the lookout gallery with regard to the sorting of mail by the defendant on May 4 and 5 and that he did remove mail from the Sixteen Magazine section and other sections together with mail for Route 13. (Tr. 71) That at the inspector's office defendant's bag was inspected and found to contain the fourteen letters addressed to the Sixteen Magazine, the subject of this indictment, together with mail addressed to organizations outside Route 13. The witness conceded that the defendant, as a carrier, was performing his usual functions in the work area, consisting of sorting, bundling and arranging his mail for delivery. (Tr. 89) That when he was stopped on the street, he had a

"pretty full bag," (Tr. 90, l. 11) and that Exhibits 1 to 14 constituted a very small fraction of the mail in his bag. (Tr. 90, ll. 15-18)

At no time did she observe him hide any mail on his person nor open or mutilate the mail in any manner. (Tr. 93, ll. 14-24)

Lynford H. Nehil, a postal inspector, generally corroborated the testimony given by Inspectors Macho and Popoli, to the effect that the defendant, in "sweeping" the work area commingled mail from Sixteen Magazine and other organizations with Route 13 mail, which he placed in a tray in his work area. That when the defendant left the building, Inspector Nehil followed him and, together with Inspector Macho, apprehended him at 53rd Street and Lexington Avenue, from which point they proceeded to the inspector's office in the FDR Postal Station. (Tr. 104)

An examination of the mail sack revealed the fourteen letters addressed to Sixteen Magazine, mail to other addressees together with Route 13 mail. A search of the person revealed OTB betting slips and personal effects. Defendant was apprehended while going toward his route (Tr. 108, l. 20) and that none of

the mail in defendant's possession at that time was in anyway altered. (Tr. 109, 11. 14-22)

Defendant, testifying on his own behalf, admitted that he removed mail from other separations and placed them in his delivery bag with Route 13 mail but denied that he intended to keep the mail for his own purposes. (Tr. 115, 11. 23-24) He stated that he filled his bag in order to have more time on the street since the bulk of their bag was checked when they left on their route to determine the length of time required for street delivery. (Tr. 114, 1. 21 to Tr. 115, 1. 4)

Questions Presented

1. The evidence is insufficient to support the verdict.
2. The trial court erred in not giving a requested instruction.

ARGUMENT

I

The evidence as a whole is insufficient to support the verdict.

The facts are clear and not in dispute. Defendant, a United States postal letter carrier, on

May 5 while on duty and in the course of his employment, was observed by the postal authorities commingling letters addressed to Sixteen Magazine and others with mail consigned to his own Route 13. He admitted that he took the mail from other separations (Tr. 113, l. 18 to Tr. 114, l. 15) and that his purpose was to fill his bag to give him more time on the street. (Tr. 115, ll. 2-3) That at the conclusion of his delivery he would drop this mail in the mail box (Tr. 115, ll. 21-22), which accounts for the double postmark.

This variable in street time for mail delivery was confirmed by Government witness, Raymond Sahadi (Tr. 49, ll. 7-23), and apparently is a factor in carrier delivery in the postal system.

The question before this court, therefore, is whether the "defendant, being a postal service employee, did unlawfully, wilfully and knowingly embezzle the letters which had come into his possession and were intended to be conveyed by mail...". (18 United States Code 1709)

This record does not lend support to the Government's position that the commingling of mail from routes assigned to the defendant with mail from his own route per se constitutes embezzlement within the statutory definition.

No evidence has been submitted that the removal of mail from other bins during the sorting process in the inner postal office routine was in and of itself unlawful. No evidence was submitted that carrying mail in the regulation postal bag from routes other than the carrier's own was unlawful absent an overt act consistent with conversion to one's own use. To Embezzle means

"to take wilfully or convert to one's own use another's money or property of which the wrongdoer acquired possession lawfully by reason of some office or employment or position of trust."¹

Embezzlement has been defined as "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." (Moore v. United States, 160 U.S. 268, 269-70)

The clear meaning of embezzlement was stated by the Supreme Court in Morrisette v. United States, 342, 240, 272, 1951 where it held (per Jackson, J.):

"Conversion, however, may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or

¹United States v. Miller, 520 F.2d 1208, 1211, 1975.

"abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact. It is not difficult to think of intentional and knowing abuses and unauthorized uses of government property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining. Knowing conversion adds significantly to the range of protection of government property without interpreting it to punish unwitting conversions."

Our courts in all cases cited under Section 1709 of Title 18 U.S. Code upheld a conviction only upon the happening of an overt act, clearly consistent with conversion to one's own use.

In United States v. Holley (463 F.2d 634, 636, CA Fla. 1972), the carrier was stopped in an exit area after clocking out with mail in his pocket. In United States v. Willis, 515 F. 2d 798, 801, 7th Circ. 1975, the defendant, a regular mail handler, prepared and superimposed two new labels on packages addressed to others. The conviction was upheld because the transaction was completed (emphasis supplied).

In Kelly v. United States, 166 F.2d 343, 346, 9th Circ. 1948, the defendant took packages into his Emphasis supplied.

possession when he unlawfully removed and concealed them by throwing them into a trash basket, thereby completing the crime of embezzlement.

In United States v. Mason, 218 U.S. 517, in another context, the court held that pending such audit there would be no justification for indicting the clerk (of the United States Court) as an embezzler upon the allegation that he had in his hands a surplus which he had converted to his own use. The court held that "the clerk is not in default until he refuses or fails to make his return or to pay over the surplus shown by his return to exist or the amount found upon the audit of his accounts to be payable." In other words, he could not be indicted for embezzlement until he commits an overt act consistent with conversion to his own use.

In United States v. Davis, 461 F.2d 83, 91, 5th Circ., 1972, the court reversed a conviction because "there is nevertheless no evidence showing that Diamond took the mail from the counter with an intent to steal the money orders." At bar the mail contained in the defendant's delivery bag remained intact from the sorting process to the packaging and delivery process. Until such time as this defendant clearly indicated his intent

by an overt act, the lawful possession has not come within the statutory crime of embezzlement.

The jury had difficulty with this problem when it requested that the court "please clarify what embezzlement means." (Tr. 151, 11. 15-16) It is respectfully submitted that the court's response was inadequate when it repeated the definition in its charge, to wit: "A person is said to embezzle something if he is entrusted with it or comes into possession of it by virtue of some office or position of trust and wrongfully takes it or wilfully misappropriates it." This limited definition was clearly inadequate and of little help to the jury in determining whether the defendant committed the crime of embezzlement as defined by the statute and by the courts.

II

The trial court erred in not giving
a requested instruction.

Defendant included in his requests to charge that "to find the defendant guilty you must first determine that the letters in question were taken from the postal system and converted to his own use." (6a)
Embezzlement is purely statutory in its origin and though

likened to larceny, it differs in that the original taking or possession of the property was lawful. The line of demarkation, therefore, can only result from an overt act not consistent with lawful possession,* an act done for the benefit of the actor akin to conversion to one's own use; i.e.: placing mail in one's pocket or in a trash basket or superimposing a label on a package to divert it from the rightful addressee, or opening or otherwise mutilating mail.

The requested charge, "to find the defendant guilty you must first determine that the letters in question were taken from the postal system and converted to his own use" comes within the statutory definition of embezzlement and may have supplied the missing component, thereby enabling the jury to fully understand the nature of the crime before it. The failure to so charge was erroneous.

CONCLUSION

For the foregoing reasons, it is respectfully

*United States v. Kehoe, 365, F. Supp. 920, 922, S.D., Texas, 1973.

submitted that the judgment of conviction be set aside
and the indictment dismissed.

Respectfully submitted,

ARMENDE LESSER
Attorney for Defendant-
Appellant

APPENDIX 1a

OFFENSE PO ☐ JUDGE/MAGISTRATE Assigned ☐ U.S. 0857 LINDAU, ROBERT

OFFENSE MO ☐ Disposition 0208 01

MEANOR Mis ☐ FELONY Fel ☒ No. of Dets *01

Case Filed Mo Day 08 06 Yr 76 Docket No. 0725 Def 01

U.S. MAG. CASE NO. 76-564

U.S. TITLE SECTION 18:1709

OFFENSES CHARGED Embezzlement of mail.

ORIGINAL COUNTS 1-14

Handwritten: 77, 2, 14

II. KEY DATES & INTERVALS

ARREST or U.S. Custody Began 8:15 a.m. 5/5/76

INDICTMENT X Information 8-6-76

ARRAIGNMENT Trial Set For 2-2-77

TRIAL Trial Date 2-1-77

First Appearance 8-12-76

Superseding Counts

U.S. MAG. CASE NO. 76-564

AMT. Fugitive

Denied Set Pers. Recog.

PSA

conditions

10% Deposit

Surety Bond

Collateral

3rd Cust Other

SENTENCE 3-8-77

Disposition of Charge

Dismissed

WCP

WFP

MAGISTRATE

DATE 5/5/76 INITIAL NO. HJR-080D

INITIAL APPEARANCE DATE 5/5/76

PRELIMINARY EXAMINATION OR REMOVAL HEARING

DATE 5/25/76

WAVED ☒ WAIVED

INTERVENING INDICTMENT

OFFENSE (in Complaint) 18 USC 1709 - POSSESSION OF A STOLEN LETTER

U.S. Attorney or Asst.
RAYMOND T. LEVITES
John S. Siffert relieved
791-1922

ATTORNEYS
XXXXXXXXXXXXXXXXXXXX ROLAND THAU
5 Park Row
N.Y.C.

ARNOLD BESSIE
175 5th Avenue
New York, N.Y.
HU 5-7900

* Show last names and suffix numbers of other defendants in same and pertinent information

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY
5/5/76		Complaint filed, defendant assigned Legal Aid. Defendant released on his own recognizance.	
8/6/76		Indictment filed, 76 Cr. 725	
8-12-76		Deft. (Atty. present) enters a not guilty plea. Case assigned to Judge Carter for all purposes. Report to chambers as soon as possible. Deft. R.O.R. and subject to Pre-Trial Agency. Deft. ordered fingerprinted and photographed. Goettel, J.	
8-13-76		Filed Deft's CJA-23 Financial Affdvt.	
9-7-76		Pre-Trial Conference Held. 2 Day Trial. Govt. Atty will be on Trial through October 1, 1976. Deft to file motions by Sept 13, 1976...CARTER, J.	
9-10-76		Filed Govt's Notice of Readiness for Trial on or after 9-8-76.	
10-18-76		Pre Trial Conference Held. Bench Warrant Ordered...Carter, J.	
10-19-76		Bench Warrant Iss.	
12-2-76		Filed Magistrate's Final Commitment rec'd from the Eastern District of Tennessee, So. Div.	
12-9-76		Filed Warrant of Removal on Indictment(True Copy) .	

Cont'd on page 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

-v- :

ROBERT M. LINDAU, :

Defendant. :

INDICTMENT

76 Cr.

COUNTS ONE THROUGH FOURTEEN

The Grand Jury charges:

On or about the 5th day of May, 1976 in the Southern District of New York, ROBERT M. LINDAU, the defendant, being a Postal Service employee did unlawfully, wilfully and knowingly embezzle the letters which had come into possession, and were intended to be conveyed by mail, set forth in Counts One through Fourteen.

<u>Count</u>	<u>Return Address</u>	<u>Addressee</u>
1	Rita Humphrey 66 Ritford Ave. Staten Island, NY 10312	"Dreamsville" 16 Magazine 745 Fifth Ave. New York, N.Y. 10022
2	140 Webster R.D. Graham, N.C. 27253	5 Errors Contest 16 Magazine 745 Fifth Ave. N.Y., N.Y. 10022
3	Sherri Foster P.O. Box 187 Lepanto, Ar. 72354	TV Times Mystery Pic 16 Magazine 745 Fifth Avenue New York, N.Y. 10022
4	Elizabeth Trent Rt. 3 Box 290 Ineger, W. Va. 24844	Nancy La Reine 16 Magazine, 745 Fifth Ave. New York, N.Y. 10022
5	871 Springwood Dr. S.E. Grand Rapids, Mich. 49508	16's Fabulous Wallet Photos 16 Magazine 745 Fifth Ave. New York, N.Y. 10022

<u>Count</u>	<u>Return Address</u>	<u>Addressee</u>
6	K. Norris 21 Maya Rd. Onehunga Auckland New Zealand	The John Denver Super Gala Gift Giveaway 16 Magazine 745 Fifth Avenue New York, New York, 10022
7	Joy Lindsey Bumpis Mills Tenn., Rt. 1, Box 42 37028	Darlin' Donny Kit Order Department 16 Magazine 745 Fifth Avenue N.Y., N.Y. 10022
8	Linda Aldrich 125 Bonaventure Drive Unit 25 Hamilton, Ontario Canada L9C5Y9	"Dreamsville" 16 Magazine 745 Fifth Avenue New York, New York U.S.A. 10022
9	16915 Newhampshire Southfield Michigan 48075	Dreamsville 16 Magazine 745 Fifth Avenue New York, N.Y. 10022
10	Nancy Elaine Velasco 20517 Buffalo Detroit, Mich. 48234	Darlin' Donny Kit Order Department 16 Mag. 745 Fifth Ave. N.Y.; N.Y. 10022
11	Ms. Barbara Williams 1510 W. 13th Street Apt#203 Chicago, Illinois 60603	16 DeeJay of the Month 16 Magazine 745 Fifth Avenue New York, N.Y. 10022
12	Laura Crawford 1102 S. Warman Indianapolis Ind. 46221	5 Errors Contest 16 Magazine 745 Fifth Ave. N.Y. N.Y. 10022
13	Susan Swindell R.D. 1 Box 45 Salisbury, Pa. 15558	Heywoods Album Giveaway 16 Magazine 745 Fifth Avenue New York, N.Y. 10022
14	Kara Kubiak 3286 Elliot Blvd Oceanside N.Y. 11572	TV Time Mystery Pic 16 Magazine 745 Fifth Ave New York, N.Y. 10022.

(Title 18, United States Code, Section 1709)

FORTRAN

ROBERT B. FISKE, JR.
United States Attorney

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-v-

76 Cr.

ROBERT M. LINDAU,

Defendant.

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REQUESTS TO CHARGE

Defendant, Robert M. Lindau, respectfully requests the Court to include the following in its charge to the jury:

REQUEST NO. I

Embezzlement is the fraudulent appropriation of money or property to one's own use. Embezzlement presupposes lawful possession and to find defendant guilty you must find that he removed a letter or letters from the United States Mail System.

U.S. v Trevino
491 F2d 74,75
5th Circ., 1974

REQUEST NO. II

Embezzlement is not an offense at Common Law but was created by statute. Embezzlement includes in its meaning appropriation to one's own use and therefore the use of the single word "embezzle" in the indictment or information contains within itself the charge that the defendant appropriated the money or property to his own use.

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Therefore, to find the defendant guilty you must first determine that the letters in question were taken from the Postal System and converted to his own use.

Black's Law Dictionary
Fourth Edition, p. 614

U.S. v. Holley
463 F2d 634, cert den.
412 U. S. 929
(CA Fla., 1972)
U.S. v. Trevino, supra.

Dated, New York
January 31st, 1977.

ARMENDE LESSER
Attorney for defendant.

USA
vs
Lindau
2/1/77

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CHARGE OF THE COURT

(Carter, D.J.)

Ladies and gentlemen:

We now come to that part of the case where the evidence is in, the lawyers have presented their arguments, and you are about to exercise your final role, which is to pass upon and to decide the fact issues that are in the case.

You are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you determine the credibility of the witnesses, and you resolve such conflicts as there may be in the evidence and draw such reasonable inferences as may be warranted by the testimony or exhibits in the case.

My function at this point is to instruct you as to the law that is applicable to the case. It is your duty to accept the law as I state it to you in these instructions and to apply it to the facts as you find them.

The logical result of that application is your verdict in the case.

In respect to any fact matter, it is your recollection and yours alone that governs. Anything that counsel either for the Government or the defendant may

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1 have said with respect to matters in evidence during the
2 trial, in questions, in colloquy with the Court, in argument
3 or in summation is not to be substituted for your own
4 recollection of the evidence, So, too, anything the
5 Court may have said during the trial or may have referred
6 to in the course of these instructions as to any factual
7 matter in evidence is not to be taken in lieu of your own
8 recollection. The case must be decided by you upon the
9 sworn testimony of the witnesses, such exhibits as were
10 received in evidence, and any stipulation entered into between
11 counsel.
12

13 At times throughout this trial I have been
14 called upon to make rulings upon various matters of law,
15 as for example when a question put to a witness was objected
16 to. I have sustained some objections and I have over-
17 ruled others. Please do not concern yourself at all with
18 my reason for any of these rulings. They are purely
19 legal matters and are of no concern to you.

20 Just remember, as I told you at the outset, that
21 you are to consider only those matters that were admitted
22 in the trial record in this case.

23 It is your function to determine the truth
24 or the falsity of the testimony of each witness. No infer-
25 ence as to the credibility of any witness should be drawn

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2 from the fact that upon occasion I have asked questions of
3 a witness. My questions were only intended for clari-
4 fication or to expedite matters. They were not intended
5 to suggest any opinion as to the credibility of a
6 witness who appeared before you.

7 Now, how do you determine the truth and how
8 do you appraise the credibility of a witness? Well,
9 I think, again, I told you this when you sat down, and I
10 will repeat it. You use your plain, everyday common sense.
11 The degree of credit to be given to a witness should be
12 determined by his or her demeanor here, his or her relation-
13 ship to the controversy and to the parties, his or her bias
14 or impartiality, the reasonableness of his statement, and the
15 strength or weakness of his recollection viewed in the
16 light of all the other testimony and attendant circumstances
17 in the case.

18 Now, you observed the witnesses, You heard
19 their testimony. How did they strike you? Did their
20 answers seem frank, open, truthful, candid, or were they
21 equivocal, deliberately confusing or evasive, or were they
22 somewhere in between? How did each witness impress you?

23 And so you take each one, and on the basis
24 of your common sense and your everyday experience you
25 determine whether or not you believe the witnesses and the

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2 extent to which you do believe them.

3 Now, the testimony of a witness may fail to
4 conform to the facts as they occurred because the witness
5 is intentionally telling a falsehood or because the witness
6 did not accurately observe the event about which he testi-
7 fied or because his recollection of what happened is at
8 fault or even because he has not expressed himself clearly
9 in giving his testimony.

10 If you find that any witness has testified
11 falsely to any material fact, you may disregard all of his
12 testimony or accept such part of it as you believe worthy
13 of belief as it appeals to your reason and your judgment.

14 Or you may accept so much of the testimony of a
15 witness as you may deem true and disregard the rest. You
16 are at liberty, if you deem it appropriate, to disbelieve
17 the testimony in whole or in part even though it has not oth-
18 erwise been impeached.

19 Now, the fact that the Government is a
20 party here, that the prosecution is brought in the name of
21 the United States of America, entitles it to no greater
22 consideration than that accorded to the defendant. By the
23 same token, it is entitled to no less consideration. All
24 parties, Government and individuals alike, stand equal
25 before this Court.

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Now, in deciding this case, ladies and gentlemen, you will be called upon to consider both direct and circumstantial evidence, and I would like to explain the difference between these two types of evidence.

Direct evidence is where a witness or a party testified as to what he saw, heard or observed, what he knows of his own knowledge, something which comes to him by virtue of his senses. A document can also contain direct evidence.

Circumstantial evidence is evidence of facts and circumstances from which one may infer connected facts which reasonably flow in the common experience of mankind. Stated somewhat differently, circumstantial evidence is evidence of facts from which other facts that are material in the lawsuit may be found by a process of inference. Let me give you an example that I believe has nothing to do with the facts in this case.

Suppose you had a material issue in some case as to whether John Doe was drinking alcoholic beverages on a particular night. A witness might take the stand and testify that he had given whiskey to John Doe and had seen him drinking it. That would be what is termed direct evidence.

If you believed the witness and thought he was

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able to report accurately, you could find from that direct evidence that John Doe had been drinking on the night in question.

On the other hand, you might have a witness testify that he had seen John Doe enter a tavern and then had seen him leave the tavern a few hours later, walking and talking in ways that suggested he was drunk.

If you believed that witness and thought he was an accurate reporter, you could find on the basis of that testimony that John Doe had been drinking on the night in question. You would be using circumstantial evidence to find the existence of a material fact in that hypothetical case.

Now let me tell you that for your purpose there is no general rule of law and no general rule of good sense that places either of these two types of evidence, direct or circumstantial, in a general way on a higher or lower or different footing from the other. With respect to any evidence admitted into a trial record, whether it is direct or circumstantial, it is entitled to such weight, and you are permitted to draw such reasonable inferences, as your good judgment dictates in a particular case. The weight and effect of any item or category of evidence depends not on whether it is to be categorized as direct

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or circumstantial, but on the concrete significance of that particular piece of evidence in its trial setting and upon its intrinsic credibility and persuasive power in the light of your observation of the witnesses, your own general experience of things, and your reasonable analysis of the whole record.

There are times when different inferences may be drawn from facts whether they are proved by direct or circumstantial evidence. The Government asks you to draw one set of inferences while the defendant asks you to draw another. It is for you to decide, and for you alone, what inferences you will draw.

Now, as I advised you at the start of this trial, the indictment is merely an accusation, a charge. It is not evidence or proof of a defendant's guilt, and no inference of any kind may be drawn from the indictment.

The Government has the burden of proving the charges against the defendant beyond a reasonable doubt. It is a burden that never shifts and remains upon the Government throughout the entire trial. The defendant does not have to prove his innocence. On the contrary, he is presumed to be innocent of the accusation contained in the indictment. That presumption of innocence was within his favor at the start of the trial, continued in his

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favor throughout the trial, is in his favor even as I

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instruct you now, and it remains in his favor during the

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course of your deliberations in the jury room. It is

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removed only if and when you are satisfied that the Govern-

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ment has sustained its burden of proving the guilt of the

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defendant beyond a reasonable doubt.

8

What is a reasonable doubt? It is a doubt based

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upon reason which arises from the evidence or lack of

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evidence in the case. It is a doubt that a reasonable

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man or woman might entertain. It is not a fanciful or

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speculative doubt. It is not an imagined doubt. It is

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not a doubt that a juror might conjure up in order to

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avoid performing an unpleasant task or duty. It is not

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proof to an absolute certainty.

16

Let me repeat. It is a reasonable doubt. It

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is a doubt that appeals to your reason, to your judgment,

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to your common understanding and your common sense, a

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doubt that would cause you to hesitate to act in matters

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of importance in your daily lives.

21

On the other hand, the Government does not have

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to prove the guilt of the defendant beyond all possible

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doubt or to a positive certainty. If that were the rule,

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few people, however guilty they might be, would be con-

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victed.

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1 If, when you consider the evidence in this
2 case, you have a reasonable doubt that the Government
3 has proved any element of the crime charged, then you must
4 return a verdict of acquittal. You may not return a
5 guilty verdict simply because you feel that it is more likely
6 than not that the defendant committed the crime charged.
7 A guilty verdict is only appropriate if each and every one
8 of you is satisfied that the defendant's guilt has been
9 proved beyond a reasonable doubt.
10

11 Now let's turn to the indictment and to the
12 statute involved in the indictment. The defendant is
13 charged with violating Section 1709 of Title 18 of the
14 United States Code. That section provides in pertinent
15 part that:

16 "Whoever, being a postal service employee,
17 embezzles any letters or any article or thing contained
18 therein entrusted to him, or which comes into his possession,
19 intended to be conveyed by mail, or steals, abstracts or
20 removes from any such letters any article or thing contained
21 therein, commits a criminal offense".

22 The indictment in this case reads as follows:

23 "On or about the 5th day of May 1976, in the
24 Southern District of New York, Robert M. Lindau, the
25 defendant, being a postal service employee, did unlawfully,

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wilfully and knowingly embezzle the letters which had come into his possession and were intended to be conveyed by mail, set forth in Counts 1 through 14."

Counts 1 through 14 list the return address and the addressee of each of the 14 letters which have been admitted into evidence, and they read, for example:

"Count 1, Rita Humphrey, 66 Ritford Avenue, Staten Island, New York,"with the zip code. The addressee is Dreamsville, Sixteen Magazine, 745 Fifth Avenue, New York, New York, with a zip code, and so on down the line.

In order to prove the claims charged in this indictment, the Government is required to show beyond a reasonable doubt the following:

First, that on or about May 5, 1976, the defendant was a postal service employee;

Second, that on or about May 5, 1976, the letters set forth in the indictment I read to you came into the defendant's possession in the course of his work with the postal service;

Third, that the letters were intended to be conveyed by mail;

Fourth, that the defendant wilfully and knowingly embezzled the letters on or about May 5, 1976.

There is little need to say any more with

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respect to the first three elements that the Government must prove before the defendant may be convicted. They are self-explanatory and, I believe, not disputed. But you must find them as a fact.

With respect to the fourth element that must be proved, that the defendant wilfully and knowingly embezzled the letters set forth in the indictment on or about May 5, 1976, let me give a few words of explanation.

A person is said to embezzle something if he is entrusted with it or comes into possession of it by virtue of some office or position of trust and wrongfully takes it or wilfully misappropriates it.

An act is done knowingly if it is done voluntarily and purposefully and not because of mistake, inadvertence or other innocent reason. An act is done wilfully if it is done knowingly, deliberately and with an evil motive or purpose.

An act is not done wilfully if it is done as a result of a mistake, carelessness, lack of an evil motive or purpose or for some other innocent reason.

It is not necessary for you to find that the defendant knew he was breaking a particular law, and whether or not an act is knowing and wilful has nothing to do with the defendant's personal or private reasons for

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2 committing the act, so long as the act was done with an
3 evil purpose or motive.

4 Now, knowledge and wilfulness and intent exist
5 in the mind. Since it is not possible to look into a man's
6 mind to see what went on, the only way you have of arriving
7 at a decision on these questions is for you to take into
8 consideration all the facts and circumstances shown by the
9 evidence, including the exhibits, and to determine from all
10 such facts and circumstances whether the requisite knowledge
11 wilfulness and intent were present at the time in
12 question.

13 The indictment in this case contains 14 counts.
14 Each count charges a separate crime. You must consider
15 each count separately, and in doing so you must not allow
16 evidence concerning one count to influence your determina-
17 tion with respect to the other counts.

18 Now, the law permits a defendant to testify
19 in his own behalf, if he wishes to do so. He is not required
20 to do so. But Mr. Lindau elected to testify. And the
21 testimony of a defendant must be considered by you as
22 would the testimony of any other witness. You must
23 determine the credibility of a defendant who testifies.
24 In so doing, you must consider the deep personal interest
25 which every defendant has in the outcome of his case. Indeed

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it is fair to say that any defendant has the greatest stake in the outcome of his case.

The defendant's interest in the result of his trial is of a character possessed by no other witness. That interest requires that you receive such testimony with caution, and in appraising his credibility you must take the defendant's supreme interest into consideration.

However, it by means follows that simply because a person has a vital interest in the end result that he is not capable of telling a truthful, candid and straight forward story. It is for you to decide to what extent, if at all, the defendant's interest has affected or colored his testimony.

Now, the testimony at the trial shows that after the defendant was placed in custody, when questioned he stated that he did not know how the mail in his bag, which was not from his route, got there. The Government contends that this statement was false, and it is my recollection, although it is yours, not mine, that is controlling, that the defendant admitted on the witness stand that the statement was false.

You may consider this statement, if you find it to be false, as circumstantial evidence from which consciousness of guilt or criminal intent may be inferred.

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Whether the statement points to consciousness of guilt is a matter solely for your determination.

Under your oath as jurors you cannot allow a consideration of the punishment which may be inflicted upon the defendant if he is convicted to influence your verdict in any way or in any sense to enter into your deliberations. The duty of imposing sentence rests exclusively upon the Court. Your function is to weigh the evidence in the case and to determine the guilt or innocence of the defendant solely on the basis of the evidence and the law. You are to decide the case upon the evidence and the evidence alone, and you must not be influenced by any assumption, conjecture or sympathy or any inference not warranted by the facts.

If you fail to find beyond a reasonable doubt that the law has been violated, you should not hesitate for any reason to find a verdict of acquittal. But, on the other hand, if you should find that the law has been violated as charged, you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

I would like to point out that you should not enter the jury room with any preconceived pride of opinion. You should not be unwilling to be convinced by intelligent argument with your fellow jurors. Each juror has to answer

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to his or her own conscience and each has to decide this case for himself or herself. But in so doing you should be willing to consider the views of the other jurors and to talk things out and try your best to reach a unanimous agreement. Your verdict must be one with which each juror agrees.

If during your deliberations you deem it necessary to have a copy of the indictment or desire any of the exhibits, they will be sent in to you on request. If you wish any portion of the testimony read or the Court's charge reread, that will be done.

In conclusion let me say that every criminal case is important. It is important to the Government and it is important to the defendant. It is your obligation to decide the case on the evidence and the law as I have charged it to you, and I now give the case to you with the assurance that you will do just that.

There is, however, one step before you get the case, and that is that counsel will confer with me over the charge. We will step outside. They will indicate whether I have made any mistake, whether I should make a correction and so forth. And when we finish that, you will get the case.

(In the robing room.)

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2 MR. LESSER: I have no objection, your Honor,
3 no exceptions.

4 THE COURT: All right.

5 Let's go back.

6 I have a special verdict I am going to give
7 to the foreman. All it indicates is the 14 counts and
8 separately, so they can record their verdicts.

9 (In open court.)

10 THE COURT: All right.

11 (The alternate jurors were discharged.)

12 (The United States marshal was sworn.)

13 THE COURT: Mr. Foreman, I am going to give you
14 a sheet which lists the 14 counts. It is merely for you
15 to be able to record your deliberations. It will be
16 easier for you.

17 (At 2:45 P.M. the jury retired to commence its
18 deliberations.)

19 THE COURT: I think the indictment ought to be
20 sent in. I didn't read it.

21 MR. LEVITES: I concur.

22 THE COURT: I would think that in order for them
23 to know what they are doing, the indictment ought to be sent
24 in to them without requesting it.

25 MR. LESSER: I agree.

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2 THE COURT: All right. I will give it to the
3 marshal.

4 I will now go upstairs, and if the jury wants
5 anything, any of the exhibits, if you two can agree on
6 it being sent in, if you agree, I won't have to come back
7 downstairs. If you disagree, I will have to return, if
8 that is agreeable with both of you.

9 MR. LEVITES: That is agreeable to the Government

10 MR. LESSER: That is agreeable.

11 (At 3:15 P.M.)

12 THE COURT: I have a note from the jury, which
13 we will mark as Court Exhibit 1.

xxx

14 (Court Exhibit 1 marked.)

15 THE COURT: "Please clarify what embezzlement
16 means. Taking letters unlawfully from the post office,
17 does the letters have to be opened?"

18 I think that in the process of reading,
19 they didn't catch my definition of embezzlement. But we
20 will bring them in.

21 (Jury present.)

22 THE COURT: Ladies and gentlemen, you have
23 asked me to clarify what embezzlement means, and you say,
24 "Taking letters unlawfully from the post office, does the
25 letters have to be opened?"

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2 The answer to the last question is no. That
3 is, do the letters have to be opened?

4 The answer is no.

5 A person is said to embezzle something if he
6 is entrusted with it or comes into possession of it by
7 virtue of some office or position of trust and wrongfully
8 takes it or wilfully misappropriates it.

9 The point is that what you are required to
10 do on the basis of that is to take the evidence in the
11 case and make your determination as to whether from the
12 evidence you have, the letters in question were wrongfully
13 taken or wilfully misappropriated, and you have to make
14 that determination, as I have indicated, based upon a
15 determination as to whether the act was wilful, was done
16 wilfully or not. And I defined that to you.

17 So that it isn't a question of whether they
18 they have to be opened or anything like that. The question
19 is what you find from the circumstances and from the facts
20 as you find them as to whether or not you conclude that the
21 letters were wrongfully taken and that there was the
22 intent to misappropriate them. And you have to reach
23 that conclusion based upon your analysis of the facts and
24 the circumstances.

25 All right.

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2 (At 3:19 P.M. the jury again retired to
3 continue their deliberations.)

4 THE COURT: Anything further?

5 MR. LEVITES: Nothing.

6 (At 3:32 P.M., jury present.)

7 THE CLERK: Mr. Foreman, has the jury agreed
8 on a verdict?

9 THE FOREMAN: We have.

10 THE CLERK: Would you read your verdict, please?
11 As to each count.

12 THE FOREMAN: Yes. We find the defendant
13 guilty on Count Number 1; guilty on Count Number 2; guilty
14 on Count Number 3; guilty on Count Number 4; guilty on Count
15 Number 5; guilty on Count Number 6; guilty on Count Number
16 7; guilty on Count Number 8; guilty on Count Number 9; guilty
17 on Count Number 10; guilty on Count Number 11; guilty
18 on Count Number 12; guilty on Count Number 13, and guilty
19 on Count Number 14.

20 THE CLERK: You say you find the defendant
21 Robert Lindau guilty on Counts 1, 2, 3, 4, 5, 6, 7, 8, 9,
22 10, 11, 12, 13 and 14, and so say you all.

23 (All jurors answered in the affirmative.)

24 THE COURT: Do you want the jury polled?

25 MR. LESSER: It is not necessary, Judge.